FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

March 21, 2005

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE GREGORY SHAWN PRITNER and TANYA LYNN BEIGHTS-PRITNER, Debtors.	BAP No. WO-04-080
GREGORY SHAWN PRITNER and TANYA PRITNER, Plaintiffs – Appellants, v. COFCO CREDIT COMPANY, L.L.C., Defendant – Appellee.	Bankr. No. 99-16898-BH Adv. No. 03-1371-BH Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the Western District of Oklahoma

Before NUGENT, McNIFF, and THURMAN, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

The Chapter 7 debtors timely appeal a final Judgment of the United States Bankruptcy Court for the Western District of Oklahoma in favor of COFCO

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Credit Company, L.L.C. (Cofco)[1] dismissing their Complaint against Cofco pursuant to 11 U.S.C. § 524.[2] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the Western District of Oklahoma.[3] We REVERSE and REMAND.

I. Background

Cofco financed the debtors' purchase of a car. When the debtors defaulted on this debt, Cofco repossessed the car, sold it, and applied the sale proceeds toward the debtors' debt. After the sale, the debtors still owed Cofco approximately $6,000 (Deficiency Debt). In January 1998, Cofco served the debtors with a notice, demanding that they contact Cofco to make arrangements to pay the Deficiency Debt. More than one year later, in August 1999, the debtors filed a Chapter 7 petition. As of the petition date, Cofco had not collected the Deficiency Debt from the debtors.

The debtors did not list Cofco's address in their Chapter 7 papers, and as a result, Cofco did not receive notice of the case. A "Notice of No Dividend" was made by the Chapter 7 trustee pursuant to Federal Rule of Bankruptcy Procedure 2002(e), advising creditors that it was unnecessary to file claims in the debtors' case because there were no assets available for distribution,[4] and the case was administered by the trustee as a "no asset" case. In September 1999, the trustee filed a Report of No Distribution in the bankruptcy court, stating: "I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of

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[1] 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

[2] All future statutory references in the text are to title 11 of the United States Code.

[3] 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

[4] Appellee's Brief at 12.

property belonging to the estate; and that there is no property available for distribution from the estate over and above that exempted by law."[5] In November 1999, the debtors received their discharge, and their Chapter 7 case was subsequently closed.

In October 2002, four and one-half years after the Deficiency Debt arose and almost three years after the debtors received their discharge, Cofco filed a Petition against the debtors in state court to collect the Deficiency Debt. Without knowledge of the debtors' Chapter 7 case or their discharge, Cofco later served the Petition and a Summons on the debtors. The debtors did not answer the Petition or otherwise inform Cofco of their discharge, and on June 23, 2003, a Default Judgment was entered in the state court action, awarding Cofco over $15,400 in principal, prejudgment interest, attorney's fees and costs. The Default Judgment was served on the debtors.

On July 11, 2003, the debtor-husband hand-delivered copies of some bankruptcy papers to the office of Cofco's attorney. On July 29, 2003, Cofco garnished the debtor-husband's wages. Wages were garnished monthly thereafter until at least November 2003.[6]

During this period, the debtors' attorney contacted Cofco several times, requesting that Cofco cease collection of the Deficiency Debt. Telephone calls were made by debtors' counsel on August 21, 2003, and September 17, 2003. A letter dated September 11, 2003, requesting that Cofco cease collection, was received by Cofco's attorney on September 16, 2003. In October 2003, the debtors' Chapter 7 case was reopened to allow them to amend their Schedules.

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[5] Trustee's Report of No Distribution, Exhibit A to Stipulations of Fact, in Appellants' Appendix at 23.

[6] The debtors represented to the bankruptcy court that the state court stayed Cofco's garnishment on November 22, 2003. Summary Judgment Motion ¶ 6, in Appellants' Appendix at 126.

On October 17, 2003, Cofco's attorney received a copy of the debtors' amended Schedules. In a letter dated November 4, 2003, the debtors' attorney stated:

> Per our earlier conversation, it is my understanding that you represent Cofco . . . and further are aware that the above-referenced case has been reopened and you have acknowledged receipt of the amended schedules that were filed.
>
> It is also my understanding that you do not intend to stop the ongoing garnishment. This is my formal request for written proof of the termination of garnishment to be provided to me within 48 hours.
>
> My client has instructed me to commence an adversary proceeding or other appropriate relief against your client, if the garnishment has not ceased within 48 hours.[7]

On the same day, Cofco's attorney responded to this letter, stating that Cofco would not cease collection of the Deficiency Debt as the debtors were "guilty of gross laches" due to their failure to notify Cofco of their Chapter 7 case.[8]

On November 12, 2003, the debtors commenced an adversary proceeding against Cofco, alleging that Cofco's collection efforts violated § 524(a).[9] Cross Motions for Summary Judgment were filed, as well as a Statement of Stipulated Facts. In its Summary Judgment Motion, Cofco admitted that the Deficiency Debt was discharged.[10] It maintained, however, that under the doctrine of laches, the discharge was inapplicable to it, or that the debtors were estopped from asserting the discharge, and that the debtors were barred were from seeking relief under § 524. According to Cofco, laches applied because the debtors had not listed it in their Schedules, and did not inform it of their discharge prior to entry of the Default Judgment.

The bankruptcy court granted Cofco's Motion for Summary Judgment,

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[7] Letter dated November 4, 2003, in Appellants' Appendix at 33.

[8] Letter dated November 4, 2003, in Appellants' Appendix at 34.

[9] The debtors also alleged that Cofco's actions were willful violations of the automatic stay, but later abandoned that claim.

[10] Summary Judgment Motion at 5, in Appellants' Appendix at 143.

denied the debtors' Motion, and dismissed the debtors' Complaint. It held that the debtors were barred from asserting that the Deficiency Debt was discharged under the doctrine of laches and, therefore, they were not entitled to relief under § 524. The debtors moved to amend or alter the bankruptcy court's Judgment, but their Motion was denied.

This appeal followed.

II. Discussion

The only issue in this case is whether the bankruptcy court erred as a matter of law[11] in refusing to apply § 524, which states, in relevant part, that:

> (a) A discharge in a case under this title–
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727. . . of this title . . . ;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor . . . [.][12]

For the reasons discussed in paragraph II.A and II.B below, we conclude that the bankruptcy court erred in refusing to apply § 524(a) because the Deficiency Debt is a "debt discharged under section 727."[13] Equitable doctrines do not impact the

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[11] The parties filed a Statement of Stipulated Facts below. They do not dispute that this matter was properly disposed of by Summary Judgment. The only issue is the application of § 524, which as discussed below, depends on the application of §§ 523(a) and 727. This issue is a question of law reviewed *de novo*. *See, e.g., Elder v. Holloway*, 510 U.S. 510, 516 (1994) (questions of law reviewed *de novo*); *United States v. Telluride Co.*, 146 F.3d 1241, 1244 (10th Cir. 1998) (construction and applicability of federal statutes reviewed *de novo*).

[12] 11 U.S.C. § 524(a)(1)-(2).

[13] There is no issue in this case that the Deficiency Debt is a prepetition debt that is a "personal liability of the debtor[s]," as opposed to an *in rem* action against property. 11 U.S.C. § 524(a)(1) & (2); *see Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991) (§ 524 operates only with respect to the personal liability of the debtor); *In re Walker*, 927 F.2d 1138 (1991)(same); *Chandler Bank v. Ray*, 804 F.2d 577 (10th Cir. 1986) (per curiam) (§ 524 does not affect *in rem*

effect of the discharge under § 524(a). Accordingly, the bankruptcy court's Judgment should be reversed because the debtors are entitled to protection under § 524(a) as a matter of law.

In paragraph II.C, we apply § 524(a) to this case. In so doing, we conclude that the Default Judgment is void under § 524(a)(1). Thus, Cofco cannot enforce that Judgment, and it must return any wages it garnished to the debtors. Cofco's post-discharge acts to collect the discharged Deficiency Debt also violated the injunction set forth in § 524(a)(2). We remand the case to the bankruptcy court to determine whether relief should be afforded to the debtors for Cofco's violations of the § 524(a)(2) injunction.

A. The Deficiency Debt is a "debt discharged under section 727" to which § 524(a) applies as a matter of law.

As stated above, § 524(a) applies to "debt[s] discharged under section 727."[14] The debtors received a discharge under § 727(a), and the scope of that discharge is set forth in § 727(b), which states:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.[15]

It is undisputed that the Deficiency Debt is a prepetition debt and, therefore, unless it is nondischargeable under § 523, it was discharged by operation of law

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[13] (...continued)
actions).

[14] 11 U.S.C. § 524(a)(1)

[15] *Id.* § 727(b).

pursuant to § 727.[16] As discussed herein, the Deficiency Debt is not excepted from discharge under § 523 and, therefore, it is a "debt discharged under section 727" to which § 524(a) applies.

The only provision of § 523 relevant to this appeal is § 523(a)(3)(A),[17] which states:

> (a) A discharge under 727 . . . of this title does not discharge an individual debtor from any debt–
>
> (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit–
>
> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing[.][18]

This section, however, does not apply to except the Deficiency Debt from discharge, even though Cofco did not have notice or actual knowledge of the debtors' Chapter 7 case until July 2003. In *In re Parker*,[19] the Court of Appeals for the Tenth Circuit held that § 523(a)(3)(A) does not apply to except unscheduled debts from discharge in no asset cases where no deadline to file proofs of claim is set, because unscheduled creditors can file "timely" proofs of

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[16] *In re Parker*, 313 F.3d 1267, 1269 (10th Cir. 2002) (quoting *Watson v. Parker (In re Parker)*, 264 B.R. 685, 694-95 (10th Cir. BAP 2001) (Unless § 523 applies, prepetition debts are discharged "by operation of law under § 727(b).")).

[17] Cofco admits that the Deficiency Debt is not of a kind specified in § 523(a)(2), (4) or (6) and, therefore, § 523(a)(3)(B) does not apply. Appellee's Brief at 12; Motion for Summary Judgment at 5, in Appellants' Appendix at 143.

[18] 11 U.S.C. § 523(a)(3)(A).

[19] 313 F.3d 1267, 1268-69 (10th Cir. 2002); *see Dawson v. Unruh (In re Dawson)*, 209 B.R. 246, 250 (10th Cir. BAP 1997) (unscheduled debt was excepted from discharge under § 523(a)(2)(A) in a no asset case where a Notice of No Dividend under Fed. R. Bankr. P. 2002(e) was not served; but, cases where a Notice of No Dividend was served were distinguished, and the Court stated that § 523(a)(2)(A) would not apply to except the unscheduled debt from discharge because "the creditor's right to file a proof of claim would be preserved.")

claim if assets become available for distribution. Specifically, the court stated:

> Under § 523(a)(3)(A), a claim will not be discharged if it was neither listed nor scheduled and the creditor did not have notice or actual knowledge of the case so that the creditor could timely file a claim. Here the bankruptcy court correctly found that § 523(a)(3)(A) does not apply because the Debtor's Chapter 7 case was a no asset case with no claims bar date set; therefore, [the creditor] suffered no prejudice because [she] will have an opportunity to file a claim if any assets are discovered.[20]

Parker is directly on point in this case. Section 523(a)(3)(A) does not apply because, although Cofco did not have notice of the debtors' Chapter 7 case until July 2003, the debtors' case was administered as a no asset case with no set claims bar date and, therefore, Cofco was not deprived the opportunity to file a timely proof of claim. "[E]quitable considerations," such as the debtors' reasons for failing to schedule Cofco, "do not impact the dischargeability" of the Deficiency Debt under § 523(a)(3)(A).[21]

Cofco ignores *Parker* on appeal, arguing that the Deficiency Debt is nondischargeable under § 523(a)(3)(A) because the debtors failed to schedule it prior to their discharge. Such arguments simply are unavailing in light of *Parker*, which is the controlling law in this Circuit. While it is beyond dispute that the debtors had an affirmative duty to schedule Cofco, *Parker* dictates that their failure to do so is not grounds for excepting the Deficiency Debt from discharge under § 523(a)(3)(A). The bottom line is that Cofco was not prejudiced by the debtors' breach of duty because the debtors had no assets to distribute to creditors. Even if it had been properly scheduled prior to the debtors' discharge, Cofco would not have received a distribution on account of the Deficiency Debt. The fact that it was not scheduled does not allow it to now obtain payment of that discharged prepetition debt.

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[20] 313 F.3d at 1269 (quoting *Parker*, 264 B.R. at 694-95 (footnote omitted)).

[21] *Id.*

Cofco contends that the debtors' failure to schedule it when their case was filed *was* prejudicial because it was not given an opportunity to participate in the finding that the debtors' case was a no asset case. According to Cofco, designation of the debtors' case as a no asset case was based solely on the debtors' representations. It states that: "If those representations are false then there is no valid basis for concluding that the case is a no asset case."[22] This argument was waived below when Cofco admitted that the Deficiency Debt was discharged in the debtors' no asset case, and when it failed to show that the debtors' asset disclosures were false or that the Chapter 7 trustee breached his investigative duties pursuant to §§ 323(a), 341, 343 and 704. Furthermore, even if Cofco did prove that the debtors' case should not have been administered by as a no asset case, it would not affect the outcome herein--the Deficiency Debt would not be excepted from discharge under § 523(a)(3)(A) because Cofco, along with the debtors' other creditors, could timely file proofs of claim and participate in any distribution of assets.[23]

Finally, Cofco argues that the "mechanical approach" to discharge adopted in *Parker* is unconstitutional. We refuse to consider this argument because it was not raised below[24] and, in fact, it directly conflicts with Cofco's admission below that the mechanical approach "controls here as it is the law of this Circuit."[25]

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[22] Appellee's Brief at 9.

[23] *See* Fed. R. Bankr. P. 3002(c)(5).

[24] *See, e.g., Walker v. Mather (In re Walker),* 959 F.2d 894, 896 (10th Cir. 1992) (appellate court will not consider issues that were not raised below); *O'Connor v. City & County of Denver,* 894 F.2d 1210, 1214 (10th Cir. 1990) (appellate court will not consider claims that were waived or abandoned below); *In re Crowder,* 314 B.R. 445, 449 (10th Cir. BAP 2004) (same) (citing *Employers Reinsurance Corp. v. Mid-Continent Casualty Co.,* 358 F.3d 757, 769 (10th Cir. 2004) (quoting *Hynes v. Energy West, Inc.,* 211 F.3d 1193, 1201-02 (10th Cir. 2000))).

[25] Summary Judgment Motion at 5, in Appellants' Appendix at 143 (citing (continued...)

The Deficiency Debt cannot be excepted from discharge under § 523(a)(3)(A) and, therefore, it has been "discharged by operation of law under § 727(b)."[26] Accordingly, the Deficiency Debt is "a debt discharged under section 727" to which § 524(a) applies as a matter of law.

B. Equitable doctrines, such as laches, do not bar the application of § 524(a).

The bankruptcy court relied on its prior decision in *Logan v. Quail Creek Bank, N.A. (In re Logan)*[27] in refusing to enforce the § 524 discharge injunction. As it did in *Logan*, the bankruptcy court concluded the equitable doctrine of laches barred the debtors from seeking that relief. In *Logan*, the bankruptcy court stated that the protections in § 524 are afforded only to "the diligent debtor."[28] In light of the Tenth Circuit's subsequent declarations in *Parker*, we respectfully disagree.

As noted above, in *Parker,* the Tenth Circuit joined several other Circuits in concluding that a debtor's intent in failing to schedule a creditor is irrelevant to determining whether that debtor's motion to reopen a case should be granted. We see no reason why these equitable considerations should be any more relevant in the context of enforcing a properly obtained discharge than they are in reopening a case.

Section 524 governs the effect of a discharge. It "affords broad benefits to the debtor,"[29] and "[t]he injunction [in § 524(a)(2)] is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as

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[25] (...continued)
Dawson, 209 B.R. at 246).

[26] *Parker,* 313 F.3d at 1269 (quoting *Parker*, 264 B.R. at 695).

[27] 144 B.R. 538 (Bankr. W.D. Okla. 1992).

[28] *Id.* at 539.

[29] *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990).

a total prohibition on debt collection efforts."[30] Section 524 contains no provision preventing its application based on a debtor's pre- or post-discharge conduct, or based on equitable considerations or doctrines. Bankruptcy courts, acting as courts of equity, cannot disregard § 524, or circumvent §§ 523(a) and 727 by refusing to apply the discharge to certain debts.[31] The only way to avoid application of § 524 is to obtain a judgment denying a debtor's discharge pursuant to § 727(a), to obtain a judgment excepting a specific debt from discharge under §§ 523(a) and 727(b), or to obtain a judgment revoking a discharge that has been granted under § 727(d).

As discussed above, the debtors obtained a § 727 discharge, and Cofco did not, and cannot, obtain a judgment of nondischargeability as to the Deficiency Debt under § 523(a). Furthermore, no grounds have been asserted for revoking the debtors' discharge under § 727(d), and the time to do so has long since passed.[32] As a result, § 524(a) applies as a matter of law, and the bankruptcy court erred in refusing to apply it based on the equitable doctrine of laches.

Accordingly, we conclude that equitable doctrines, such as laches, do not apply to affect the application of the debtors' discharge as a matter of law. The Deficiency Debt was discharged under § 727 in November 1999. Because the Deficiency Debt is a prepetition "debt discharged under section 727," § 524(a)

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[30] S. Rep. No. 95-989, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5866; H.R. Rep. No. 95-595, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6321; *see* 4 *Collier on Bankruptcy* ¶ 524.02 (15th ed. rev. 2002) ("Section 524(a) ensures that a discharge will be completely effective and will operate as an injunction . . . .").

[31] *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); *Western Real Estate*, 922 F.2d at 601 (holding that an injunction under § 524(a) does not extend to nondebtors, the Tenth Circuit stated "a bankruptcy court's supplementary equitable powers [under § 105] may not be exercised in a manner that is inconsistent with other, more specific provisions of the Code.") (citing cases).

[32] 11 U.S.C. § 727(e).

applies regardless of the debtors' failures toward Cofco. The debtors' conduct is relevant only in determining the extent of their remedies against Cofco under §§ 105 and 524(a)(2).[33] The bankruptcy court's Judgment, therefore, must be reversed. We turn now to the application of § 524(a) in this case.

C. Application of § 524 in this case.

Cofco's collection of the discharged Deficiency Debt implicates § 524(a) in three ways. First, Cofco's state court action was "the commencement . . . of an action, the employment of process, or an act to collect" the discharged Deficiency Debt as a personal liability of the debtors in violation of the injunction set forth in § 524(a)(2). Second, the Default Judgment entered in the collection action, which is a "determination of personal liability of the debtor[s] with respect to" the discharged Deficiency Debt, is void as a matter of law pursuant to 524(a)(1). Finally, Cofco's garnishment of the debtor-husband's wages after it learned of the debtors' discharge was an "act . . . to collect" the discharged Deficiency Debt as a personal liability of the debtors in violation of the § 524(a)(2) injunction. The consequences of these acts are discussed below. We first discuss the effect of void Default Judgment, and then turn to Cofco's violations of the § 524(a)(2) injunction.

As noted above, the Default Judgment is "void" pursuant to § 524(a)(1). A void judgment has no effect and, therefore, the Default Judgment cannot be enforced.[34] Cofco must repay the debtors the wages that it garnished based on the void Default Judgment.

The consequences of Cofco's violations of the injunction set forth in

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[33] *See infra.*

[34] *See Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994) (order in violation of the automatic stay is void and "without effect")); *Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371, 373 (10th Cir. 1990) (same)*; see also Kalb v. Feurstein,* 308 U.S. 433, 438 (1940) (state court orders are void and without effect if entered after bankruptcy commenced).

§ 524(a)(2) are less clear. Section 524 does not create a cause of action for damages.[35] Violations of § 524(a)(2) are treated as civil contempt, and remedies may be made, within the discretion of the bankruptcy court, under § 105(a).[36]

The debtors requested damages, attorney's fees and costs.[37] The bankruptcy court refused to award such relief, holding that the debtors were "barred from seeking relief for enforcement of the discharge injunction . . . under the equitable doctrine of laches."[38] We have determined, however, that the doctrine of laches cannot bar enforcement of the discharge injunction as a matter of law, and that § 524(a) applies in this case. Accordingly, we remand this matter to the bankruptcy court to consider the debtors' request for relief under §§ 105 and 524(a)(2).

III. Conclusion

The bankruptcy court is REVERSED, and the matter is REMANDED for proceedings consistent with this Order and Judgment.

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35 *Compare* 11 U.S.C. § 362(h).

36 *In re Schott*, 282 B.R. 1, 5-6 (10th Cir. BAP 2002) ("A creditor who attempts to collect a discharged debt is in contempt of the bankruptcy court that issued the discharge order. The bankruptcy court has the power to impose civil sanctions on those in contempt of its orders. *See In re Skinner*, 917 F.2d 444, 448 (10th Cir. 1990))(first citation omitted).

37 Summary Judgment Motion at 2, in Appellants' Appendix at 126.

38 Memorandum of Decision and Order at 4, in Appellants' Appendix at 157.